Supreme Court, U.S.
FILED
NOV 19 1987
JO ... JR.
CLERK

No. 87-661

In the Supreme Court of the United States

OCTOBER TERM, 1987

NORTHWOOD NURSING AND CONVALESCENT HOME, INC.,

Appellant

v.

CITY OF PHILADELPHIA, BOARD OF REVISION OF TAXES,

Appellee

On Appeal From The Commonwealth Court Of Pennsylvania

MOTION TO DISMISS AND FOR DAMAGES

HANDSEL B. MINYARD
City Solicitor
Counsel of Record

CARL OXHOLM III
Divisional Deputy City Solicitor
1580 Municipal Services Building
Philadelphia, PA 19102-1692

(215) 686-5226

Counsel for Appellee

No. 87-661

In the Supreme Court of the United States

OCTOBER TERM, 1987

MOTION TO DISMISS AND FOR DAMAGES

Pursuant to Supreme Court Rule 16.1(b), appellee City of Philadelphia, Board of Revision of Taxes hereby moves to dismiss this appeal on the grounds that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on, and that the appeal does not present a substantial federal question. Further, Appellee moves this Honorable Court to award it damages for the filing of a frivolous appeal, pursuant to Supreme Court Rule 49.2. In support of this motion, Appellee avers as follows:

1. Appellant seeks to present two questions to this Honorable Court: (1) whether an Ordinance of the City of Philadelphia placing a 60-day limit on applications for real estate tax exemptions "violates the Due Process Clause," and (2) whether the settlement of unrelated litigation involving the same Ordinance "violates the Equal Protection Clause." Neither issue was ever presented to the Philadelphia Court of Common Pleas, the Commonwealth Court of Pennsylvania, or the Pennsylvania Supreme Court.

2. In its "Statement of Questions Involved" in its brief on the merits in the Commonwealth Court of Pennsylvania, Appellant raised two questions, only one of which involved a constitutional challenge. That question read as follows:

1. Whether the Court of Common Pleas erred in

> failing to strike as invalid the provisions of Phila. Code §19-1303(3) that are inconsistent with the statutory directives of section 6 of the Local Economic Revitalization Tax Assistance Act, 72 P.S. §4727 and the constitutional intent expressed in Article VIII, §2 of the Pennsylvania Constitution.

Appellant raised no issue under the federal constitution, and it made no challenge whatsoever to the legality of the 60-day provision.

3. In its "Statement of Questions Involved" in its Petition to the Supreme Court of Pennsylvania, Appellant raised two questions, only one of which involved a constitutional challenge. That question read as follows:

> 1. Whether the Commonwealth Court erred in failing to hold invalid the 60-day time period for filing for an abatement of taxes provided by Philadelphia Code §19-1303(3), either on the grounds that the time limit is not authorized by the Local Economic Revitalization Tax Assistance Act, 72 P.S. §§4722-27, or on the grounds that it is inconsistent with the intent of Article VIII, §2(b)(iii) of the Pennsylvania Constitution.

Appellant raised no issue under the federal constitution.

4. In its "Application for Reconsideration of Petition for Allowance of Appeal" filed in the Supreme Court of Pennsylvania, in which its sole argument was that Appellee had settled unrelated litigation involving the same Ordinance, Appellant made no reference whatsoever either to the federal constitution or to the "equal protection" argument it now wishes to make.

5. Since the constitutional questions now sought to be raised by Appellant were neither presented to nor resolved by the state appellate courts, this Honorable Court is without power to consider those questions. *See, e.g., Street v. New York*, 394 U.S. 576, 581-582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *Chicago, Indianapolis & Louisville Railway Co. v. McGuire*, 196 U.S. 128, 131-133 (1905).

6. In its "Jurisdictional Statement" filed in this Court, Appellant improperly represents that it did raise the federal

constitutional issues in the state courts. That representation is wholly without justification in the record and warrants the imposition of damages under Supreme Court Rule 49.2.

7. As presented in the state courts, the legal issue raised by Appellant was whether the notice it received of the opportunity to apply for the tax exemption was adequate under state law. Both the Philadelphia Court of Common Pleas and the Commonwealth Court held that the notice was adequate.

8. As presented in this Honorable Court, the issue is whether the 60-day limitation period enacted by ordinance of the City of Philadelphia violated Appellant's right to due process of law. Appellant makes no claim that the Ordinance was improperly introduced into City Council, improperly advertised, improperly considered, improperly passed, or improperly signed into law by the Mayor. There is therefore no basis on which this Court could conclude that the legislative process followed by the City was either inappropriate or in derogation of Appellant's claimed rights.

9. Finally, as Appellant admits, (1) the ordinance at issue became law on July 11, 1983 (Jurisdictional Statement at 3); (2) the notice of exemption was given to Appellant on July 12, 1983 *(id.)*; (3) "the Board of Revision of Taxes delayed implementation of the 60-day limit until January 1, 1984 and published noticed of the change for three (3) consecutive days in December 1983" (*id.* at 9); and (4) Appellant did nothing for ten more months, until it filed for the exemption on October 11, 1984 (*id.* at 4). Since Appellant waited more than fifteen months to file for the exemption, its interest in the 60-day limitation is academic at best, and the issue for this Court is hypothetical. Moreover, as the trial court and appellate court both concluded, "had [Appellant] simply contacted the Board of Revision of Taxes, it would have been adequately informed of the necessary information."

10. There is, therefore, no substantial federal question presented by this appeal.

For all of these reasons, this Honorable Court should dismiss this appeal and award damages against Appellant pursuant to Supreme Court Rule 49.2. Those damages should include reproduction costs and counsel fees.